120.

IN THE MATTER OF: THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1970, CHAPTER 318, AS AMENDED

AND IN THE MATTER OF: THE COMPLAINT OF DOCTOR BARDI P. GURU, OF RODGER'S ROAD, DUNDAS, ONTARIO, AGAINST McMASTER UNIVERSITY, HAMILTON, ONTARIO

BEFORE: M. R. Gorsky, Board of Inquiry

DATE: Monday, April 28, 1980

PLACE: Hamilton, Ontario

APPEARANCES:

J. A. Judge	-	Counsel for Ontario Human Rights Board
Janice Baker	-	Counsel for McMaster University
Yunus Timol	-	Counsel for Doctor Bardi P. Guru

INTERIM DECISION

At the opening of the hearing counsel for the Commission and counsel for the University moved to set aside the subpoenas duces tecum served on behalf of the Commission and the Respondent.

In response to questions which I put to counsel it was apparent that the subpoenas were served for the purpose of obtaining discovery of the documents requested. (See response of Ms. Baker, at p.6 of the transcript and of Mr. Judge at pp.50-1) If such documents, on being examined, contained matter supportive of the position of the party causing the subpoena to be issued, then it appeared that they might be introduced into evidence by such party. Because counsel were frank to acknowledge the purpose for which the subpoenas were issued it becomes necessary, at the outset, to see whether there is a jurisdiction for using the subpoena duces tecum as a means of obtaining discovery because:

> ... there is no common-law right to discovery, unless a right is conferred by the relevant legislation, none exists. (Administrative Law and Practice, Reid and David (2nd ed.) (Butterworths - Toronto)) (1978) at pp.92.3.

The parties initially endeavored to secure the documents, which they now seek to have produced pursuant to the subpoenas, through an exchange of letters and, apparently as a result of their lack of success, resorted to their each requesting subpoenas duces tecum to achieve their purpose.

A case where special statutory authority was present permitting the tribunal to order production and inspection of documents is Re Pasquale and Township of Vaughan, [1967] O.R. 417 (C.A.).

The authority of a board of inquiry to issue a subpoena duces tecum is established in the Statutory Powers Procedure Act, (hereinafter referred to as the "Act") S.O., 1971, cap. 47, s.12 (1)(b) which provides that: "A tribunal may require any person, including a party, by summons, ... to produce in evidence at a hearing documents and things specified by the tribunal, relevant to the subject matter of the proceedings and admissible at a hearing".

Although, in conventional civil litigation, " ... the summoning party is entitled to require the witness to produce the document, without putting him on the witness stand to speak as to his general knowledge of the case ... the document, unless it is one which "proves itself" on production, will have to be proved by some other witness". (2 Holmested and Gale, The Judicature Act, 1508). It is significant that the language of the above quoted section (12(1)(b)) of the Act, emphasizes the fact that production of a document is for the purpose of producing it in evidence at the hearing and not for the mere purpose of obtaining discovery. There is a vital difference between the procedure permitting discovery of documents generally or specifically and those permitting the subpoenaing of a document at a hearing.

"A subpoena duces tecum or an application in the nature of such a subpoena ... may be set aside or refused where it appears that the request is irrelevant, fishing, speculative or oppressive." The Supreme Court Practice, 1979, Part I, at p.606 referring to Senior v. Holdsworth, ex p. Independent Television News Ltd., [1976] Q.B. 23 at p.35, per Lord Denning:

> ... the court should exercise this power only where it is likely that the [document] will have a direct and important place in the determination of the issues before the court. The more assertion that the [document] may have some bearing will not be enough. If the judge considers that the request is ... fishing or speculative ... the judge should refuse it. (emphasis supplied)

In this case, in response to my questions, counsel acknowledged that the immediate purpose of the subpoenas was to be able to examine the documents. Only if the documents proved useful to the party requesting the subpoena was it intended to introduce them into evidence. I also take it that the opportunity to examine documents, which might be introduced by another party, would serve as an aid in cross-examination or re-examination.

As the purpose for the subpoenas in this case is to enable an examination of the documents to ascertain whether they, in some way, support the complaint or a defence to the complaint, this does not appear to be a case where the subpoenas should be permitted to stand.

I would add the following comments concerning the position of the Commission. Unlike the right to recieve documents from the University, the Ontario Human Rights Code, (hereinafter referred to as the "Code") R.S.O. 1970, c.318, s.14(2)(b), as amended, provides certain powers whereby the "Commission or an officer of the Commission may ... require the production for inspection or examination of employment applications, payrolls, records, documents, writings and papers that are or may be relevant to the investigation of the complaint." Section 14(5) of the Code provides that "No person shall hinder, obstruct, molest or interfer with the Commission or an officer of the Commission in the exercise of a power or the performance of a duty under this

Act or withhold from it or in any employment application, payrolls, records, documents, writings or papers that are or may be relevant to the investigation of a complaint."

S.15 of the Code provides a means of punishing any breach of the provisions of the Act:

> Every person who contravenes any of the provisions of this Act or any order made under this Act is guilty of an offence and on summary conviction is liable, paragraph (a) if an individual is fined of not more than $500.00 or paragraph (b) if a corporation, trade union, employers' organization or employment agency, to a fine of not more than $500.00 or paragraph (b) if a corporation, trade union, employers' organization or employment agency, to a fine of not more than $2,000.00

Although the Commission or its officers have certain rights, which are denied other parties, to production for inspection,as I read the Code a board of inquiry does not have any power to deal with a refusal on the part of any person to produce the documents referred to in s.14(2)(b) of the Code. The Commission had every means, during the enquiry stage, of securing the documents it now seeks but apparently did not exercise its rights under s.14, for this purpose. I gather this to be the case from the statements of Mr. Judge. (See statement of Mr. Judge, at pp.50-1 of the transcript).

There are no other means of obtaining production for discovery open to the Commission. If I am wrong and the Commission's rights under s.14 of the Code are not exhausted, then it can still resort to them. It may be possible to argue that the inquiry stage of the proceedings continues through the board of inquiry stage. As I read the Code, for the purpose of discovery of documents, the inquiry stage ends when the Commission concludes that after due enquiry

and attempt at settlement, a settlement cannot be achieved, and recommends to the Minister, pursuant to s.14a(1) of the Code, that a board of inquiry be appointed. I do not read s.14c of the Code as having application to the production of documents.

Counsel appear to have been of the view that the power to issue a subpoena duces tecum permitted the use of such device for the purpose of obtaining production and discovery of the documents sought. The legislature has provided for the form of production for inspection and examination of documents by the Commission or an officer of the Commission. I have concluded that a power to issue a subpoena duces tecum does not provide an alternative method of securing this purpose.

As in the case of other tribunals, which do not possess the power to compel production of documents for inspection and examination, it may be necessary to grant an adjournment at the hearing pursuant to s.21 of the Act, in order to do substanial justice to the parties, where they are genuinely surprised by the presentation of evidence which they could not have reasonably been aware of.

The legislature could, in enacting s.12(1)(b) of the Act, have merely provided, as is often the case, that the person being subpoenaed may be required to bring with him documents referred to in the subpoena. Instead the subsection requires the person to "to produce in evidence" the documents. It has been held that even in the absence of a specific power in a tribunal to issue a subpoena duces tecum, this would be implied where the tribunal had the power to issue a subpoena requiring a person to give evidence on oath or

affirmation at a hearing. (Re International Union of Operating Engineers, Local 955 and Hunuset Bros. Ltd. (1975), 49 D.L.R. (3rd) 288 (Alta. S.C. T.D.) at p.291-2. This is not the same thing as a finding that the subpoena power could be used in place of discovery devices not otherwise provided for in the relevant legislation.

If the position of the parties is the correct one and it was permissible to utilize s.12(1)(b) of the Act as a discovery device and not only as a means of producing the documents in evidence, this would inevitably give rise to situations where the parties would be endeavoring to obtain discovery of documents, and the hearing would be suspended while inspection of the documents took place. Following such inspection the party issuing the subpoena might decide whether to call a witness to prove the document and have it introduced in evidence. I cannot believe this was the intention of the legislature.

In the recent case of Re Metropolitan Toronto Board of Commissioners et al. and Ontario Human Rights Commission et al. (1980), 27 O.R. (2d) 48 (Div.Ct.) Labrosse, J. stated, at p.49:

> The second application is for an order quashing the ruling of the board of inquiry whereby the respondent Dickson was required to produce the personnel records of certain members of the Metropolitan Toronto Police Force and whereby counsel for the board was granted an adjournment and the right of access to and of examination of such records before the inquiry proceeded.

And further at p.53:

> We find no error in the ruling of the board of inquiry in refusing to set aside the subpoena for the production of the records. There is no material in the record to enable this Court to make any determination respecting the relevance of the documents. The board has already decided that the examination of the records will be held in camera in order to protect the identity of the constables involved. In so far as their admissibility, it will be for the board to determine at the time counsel seeks to introduce them into evidence, and if they are admissible, to determine the weight they should be given.

> Mr. Parker submitted that the board has ruled in advance that the records are admissible in evidence. If this is so, and the transcript is not clear on this point, then the board was in error, because in our view, the appropriate time to rule on their admissibility is as stated above.

> Finally, in respect of the adjournment granted to counsel for the board, to permit him to examine the records, this was purely a matter of discretion. The board has exclusive jurisdiction over the conduct of its procedure and the exercise of its discretion to grant the adjournment is not reviewable by this Court, provided that the board has not violated recognized principles of fairness or conducted itself in such a way as to amount to a refusal of jurisdiction, which is not the case here. In any event, the transcript indicates that the adjournament was granted for two reasons: to permit counsel for the Board to examine the records and to permit counsel for the applicants to bring these applications.

It is not clear from the portions of the reasons for judgment in the Metro Toronto case (supra), dealing with the subpoena duces tecum, that counsel to the Commissioners was utilizing the procedure as a discovery device. From the context it appears that counsel was given an opportunity to examine the records before seeking to introduce them into evidence, at which time the matter of their being admissible in evidence would be dealt with. It is not possible, given the language employed of Labrosse, J., to interpret his reasons as indicating the subpoena duces tecum can be used solely as a discovery mechanism. As I previously indicated, such a ruling would introduce discovery into a proceeding which does not provide for it through a device which has a quite different purpose. In any event the language used in s.12(1)(b) is specific in restricting the summons:

> To produce in evidence at a hearing documents and things specified by the tribunal.

This choice of language is clearly directed to the ancillary purpose of the summons being the production in evidence and not the discovery of documents, following which the documents may, if counsel decides, be proved and tendered in evidence.

In the case of Burchard v. Macfarlane ex parte Tindall, 1891 2 Q.B. 247 Lord Escher, M. R. stated at p.247-8:

> A subpoena duces tecum was an order from the Court to a person to produce a document which was alleged to be in his possession - to produce it to the Court at the trial, and not to produce it to the parties, for, under a subpoena duces tecum, when a witness brought the document into Court the parties could not ask him for it. The parties have no right to see it, and all that could be done on a subpoena duces tecum was that the witness produced the document to the Court, subject to the order of the Court, not to the parties; and he might insist that his document should not be handed to the parties even at the trial. All that could be done was that the Judge, when he was satisfied that it was evidence in the case for either of the parties, might order it to be read.

It is therefore ordered that the subpoenas be set aside. I need not rule, at this time, on the arguments made on the subject of privilege as they relate to the documents.

I would only add that the parties appear to have resolved the matter of particulars relating to the complaint. (See p.53 of the transcript).

DATED AT London, Ontario

12 November, 1980

M. R. Gorsky
Board of Inquiry